IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S TIME BARRED CLAIMS" DKT. # 1876

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I. INTRODUCTION

The State of Oklahoma's claims in this case are not barred by any statute of limitations. As Defendants explain in their brief, there is a long-standing doctrine in the law called *nullum tempus occurrit regi* -- that is, no time runs against the sovereign. Conceding this point early on in their brief, Defendants are left with nothing more than making the non-controversial point that the State cannot enforce a statute before it was enacted (which the State does not contest) and that the State cannot assert the rights of private parties (which it has never tried to do).

Apart from these arguments, Defendants attempt to place a novel and unsupportable limitation on the State's ability to recover natural resource damages under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). According to Defendants, the State was required to bring this lawsuit back in the mid-1980s because everyone knew back then that Defendants were land applying poultry waste and that there were concerns about the environmental damages resulting from that practice. But CERCLA's statute of limitations, Section 113, speaks in terms of the discovery of a single release and its connection to a single loss. Defendants' attempt to tie the statute of limitations to the State's generalized knowledge of a condition or practice and its affect on the environment is not supported by the text of CERCLA or the applicable caselaw.

Defendants' motion should be denied in its entirety.

II. STATEMENT OF UNDISPUTED FACTS

Defendants have asserted the following factual allegations, but as explained below, these facts are quite irrelevant to the present motion. In any event, the State responds to Defendants factual allegations as follows:

1. For many years, Oklahoma officials have warned of the "accelerated eutrophication as a result of non-point source phosphorus loads from the Arkansas portion of the IRW, including contributions from poultry litter." (Def. Br. at 1.) Although Defendants point to 1983 as the year when this concern was made known, they provide no record evidence supporting this specific date.[1]

2. In 1983, Oklahoma agencies were studying "significant deterioration in the quality of the [Illinois River]" and Lake Tenkiller's "accelerated rate of eutrophication." (Def. Br. at 2.)

3. By 1985, the Illinois River was "experiencing continuing degradation of aesthetic character and water quality." (Def. Br. at 2.)

4. In 1988, the Oklahoma Department of Pollution Control received a study indicating that poultry waste was "suspected of contributing to nutrient levels in surface waters through soil percolation and direct runoff." (Def. Br. at 2.)

5. In 1991, Oklahoma activated an Illinois River Task Force to study environmental damage in the IRW. (Def. Br. at 3.)

6. Also in 1991, Oklahoma State University issued a report that identified "application of animal wastes to pastures adjacent to streams" -- conduct for which Defendants are responsible -- as a source of environmental damage in the IRW. (Def. Br. at 3.)

7. Non-point source run-off, "particularly from chicken . . . raising operations" is a "common area of environmental concern." (Def. Br. at 4.)

8. "Surface-applied poultry litter can contribute to increased amounts of nitrogen and phosphorus in percolates from soils of eastern Oklahoma." (Def. Br. at 4.)

[1] Defendants repeatedly use the phrase "poultry litter," which is not used in Oklahoma law. The correct term is "poultry waste." *See* 2 Okla. Stat. § 10-9.1(21).

9. Since around 1995, it was well known that poultry litter has been "applied in the IRW at rates exceeding the agronomic phosphorus requirements for plants, and concerns about the potential environmental impact from those applications." (Def. Br. at 4.)

10. The Oklahoma Animal Waste Task Force was asked to propose legislation to "ensure that dry litter operations take extra precautions to control nutrient runoff from the land application of dry litter." (Def. Br. at 5.)

11. In 1998, the Oklahoma Registered Poultry Feeding Operations Act went into effect. This Act, among other things, prohibits the runoff, discharge, and pollution caused by the land application of poultry waste. (Def. Br. 5-6.)

12. "Poultry litter, if not properly managed, can contribute significantly to nutrient loading."[2] Defendants are wrong, however, to suggest that poultry waste may be land applied to fields where phosphorus is no longer required to meet plant needs. *See generally* 2 Okla. Stat. § 10-9.7 (prohibiting land application where it creates and environmental or health hazard or where it results in contamination of the waters of the state). Such practices only contribute to the pollution described above by Defendants. (Def. Br. at 6.) The State specifically disputes the unsupported assertion that "[t]he legislature concluded that these laws adequately regulate the use of litter, and therefore authorized the continued use of poultry litter as fertilizer for soils that contain sufficient phosphorus to meet crop requirements, but which can benefit from the other valuable nutrients and organic material found in poultry litter." This is not a statement of fact, but a legal argument that misstates and ignores the provisions of the very laws it speaks about. Poultry waste is not regulated as a fertilizer under the Oklahoma Fertilizer Act. *See* 2 Okla. Stat. § 8-77.3(11). The State regulates poultry waste through a registration law, *see* 2 Okla. Stat. § 10-

[2] Defendants mention the "Oklahoma General Assembly." The State presumes that Defendants are referring to the Oklahoma Legislature.

9 *et seq.*, providing that "[t]here shall be no discharge of poultry waste to waters of the state," and "[p]oultry waste handling, treatment, management and removal shall[] not create an environmental or a public health hazard, [and] not result in the contamination of waters of the state . . . ." *See* 2 Okla. Stat. § 10-9.7(B)(1), (4)(a) & (4)(b); *see also, e.g.*, 27A Okla. Stat. § 2-6-105(A).[3]

13. Since at least 2001, the State, acting through the Attorney General, has attempted to hold Defendants responsible for their pollution-causing conduct. (Def. Br. at 6.)

14. The State has been active in attempting to remove poultry waste from nutrient-sensitive watersheds so that the waste may be managed according to law. (Def. Br. at 6.) The State disputes that it encourages the use of poultry waste as a fertilizer. The Oklahoma Litter market website states: "…due to the concentration of poultry and litter production in areas such as Northwest Arkansas and Eastern Oklahoma, environmental concerns have arisen because of the over-application of litter to farmland… Much of the focus is on phosphorus run-off and how to reduce it by limiting the amount of litter spread in the affected watersheds. Avoiding excess litter application protects water quality. Land application of poultry litter should be managed to recycle plant nutrients rather than for disposal." Ex. B http://www.ok-littermarket.org/what_is_poultry_litter.asp (last visited March 10, 2009). The website's link "About Phosphorus" states:

> P is not the only constituent of land applied manure that can run-off during a rainstorm. Other primary and secondary nutrients, bacteria, and oxygen-consuming organic material can also leave the field. But P is seen as the most important constituent in our reservoirs and the Ozark - type streams that feed them. In our area, fresh water is known to be "P-

[3] Defendants also claim that the Oklahoma Poultry Waste Transfer Act "regulates the transfer of poultry waste." The Act does not regulate poultry waste as Defendants suggest. The Act sets up a poultry waste transfer fund to encourage the transfer of poultry waste out of certain nutrient limited watersheds and vulnerable groundwater areas. *See* 2 Okla. State. § 10-9.13 *et seq.*

> limited". This means that very small increments in P dissolved in the water lead to large responses in algae and other plant growth, particularly in lakes. The plants cause a variety of problems from aesthetic, to angling quality, to the treatment cost and taste of the drinking water. Additions of nitrogen and potassium do not usually cause the same high degree of response as P.

Therefore, the Litter Market is a means to move poultry waste out of nutrient sensitive or nutrient limited areas, like the IRW, and not as an endorsement of its use as fertilizer.

15. The State sued Defendants in this Court on June 13, 2005.

III. THE SUMMARY JUDGMENT STANDARD

The summary judgment standard is well-established: Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

> When applying this standard, a court must examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Wolf v. Prudential Insurance Co. of America*, 50 F.3d 793, 796 (10th Cir. 1995). The movant for summary judgment must meet the initial burden of showing the absence of a genuine issue of material fact, then the nonmovant bears the burden of pointing to specific facts in the record "showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Id.*

Lumpkin v. United States Recovery Systems, 2009 U.S. Dist. LEXIS 7578, at *2-3 (N.D. Okla. Feb. 3, 2009) (Frizzell, J.).

IV. ARGUMENT

A. CERCLA – Natural Resource Damages

In this lawsuit, the State seeks, among other things, to hold Defendants liable for all natural resource damages resulting from their practice of land applying poultry waste in the Illinois River Watershed. In the Second Amended Complaint, the State asserts several causes of action that provide for the recovery of these natural resource damages. One of these claims is

asserted under CERCLA.[4] Defendants seek to dismiss this claim in its entirety based on the statute of limitations contained within CERCLA.

CERCLA provides that liable parties under Section 107 "shall be liable for . . . damages for injury to, destruction of, or loss of natural resources . . . ." 42 U.S.C. § 9607(a)(4)(C). Defendants point to Section 113 of CERCLA as a limitation on the State's claim. Section 113(g)(1)(A) provides that "no action may be commenced for damages…unless that action is commenced within 3 years after . . . the date of the discovery of the loss and its connection with the release in question." 42 U.S.C. § 9613(g)(1)(A).

Defendants have interpreted this statute of limitations as follows: as soon as the State learned about the connection between Defendants' general practice of the land application of poultry waste and the resulting releases of hazardous substances into the environment, then the State had three years to bring a claim for natural resource damage. According to Defendants, because the State did not bring a claim from the date of the discovery of the first suggestion of an connection between Defendants' disposal practices and environmental damage, the State is forever barred from bringing a claim for natural resource damage, regardless of whether Defendants have continued their illegal conduct and the natural resources continue to be injured. (*See* Def. Br. at 10, asking the Court to bar the State's entire CERCLA natural resource damage claim, even for releases that occurred since the Complaint was filed and into the future). In

[4] Even if the Court were to limit the State's CERCLA claim for natural resource damages, the State can still recover all of its natural resource damages not inconsistent with CERCLA under state law. *See New Mexico v. General Electric Co.*, 467 F.3d 1223, 1247-48 (10th Cir. 2006) (holding that CERCLA's savings clauses permit state-law recovery of natural resource damage so long as the state law does not conflict with CERCLA's monetary-recovery restrictions). "CERCLA does not preempt state laws that provide remedies unavailable under CERCLA, because these types of state law claims do not conflict with CERCLA's remedial scheme." *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 2009 WL 455260, at *6-7 (N.D. Okla. Feb. 23, 2009).

effect, Defendants claim a free pass to continue polluting indefinitely because the State did not sue them in the 1980s or 1990s. Defendants cite no case even purporting to support such a narrow reading of CERCLA.

"Congress enacted CERCLA to facilitate the expeditious cleanup of environmental contamination caused by hazardous waste releases." *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992). CERCLA "must be interpreted liberally so as to accomplish its remedial goals." *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1172 (10th Cir. 2004); *see also Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996) ("because CERCLA is remedial legislation, it should be construed liberally to carry out it purpose"). It is through this lens that Defendants' Motion and its efforts to escape liability should be evaluated.

The statute of limitations discussed by Defendants speaks in terms of a single "release" and its connection with single "loss." The statute reads: "no action may be commenced for damages . . . unless that action is commenced within 3 years after . . . the date of the discovery of ***the loss*** and its connection with ***the release*** in question." 42 U.S.C. § 9613(g)(1)(A) (emphasis added). But Defendants have tried to morph Section 113 of CERCLA into a clock starting from the moment that the State knew about the general practice of poultry waste land application and any of that practice's various detrimental effects on the environment. For example, in their brief, Defendants assert as relevant the fact that the State has known about "the practice" of the land application of poultry waste, or the "issue" of poultry waste contamination. (Def. Br. at 9-10.) And as far as the State's knowledge of the natural resource damages alleged in this case, Defendants claim the following: (1) the State has been aware of "the allegation" that poultry waste caused environmental damage as early as 1983; (2) in 1988, the State "received a study" that "noted" that animal waste is "suspected of contributing to" pollution in the IRW; and (3) in

1992, a joint task force identified poultry operations as a "common area of environmental concern." (Def. Br. at 1-4.)

No case cited by Defendants pegs the start of CERCLA's limitations period to the discovery of a general "practice" or an "issue" that causes natural resource damage. CERCLA does not start its clock because the State "received a study" noting that animal waste "is suspected of contributing to" water pollution. No case holds that Section 113 of CERCLA starts to run as soon as a trustee was made aware of an "environmental concern." Instead, CERCLA is narrowly tailored to the "discovery" of a single "release" and its connection with a single "loss." Defendants have made no allegation that in the 1980s or 1990s the State was aware of all the releases that occurred in the IRW and all the damages resulting from those releases. Defendants have not alleged that in the 1980s or 1990s the State had quantified all of its damages caused by Defendants' releases. And Defendants have not alleged that the State has known for decades the full extent of the damage caused by Defendants' releases. All Defendants have done is to allege that the State knew about the environmental risks associated with the land application of poultry waste for many years preceding the filing of the Complaint.

Defendants' practice of land applying poultry waste has caused persistent and lasting environmental effects. Each release of phosphorus from Defendants' past and present land application events have caused injuries that the State has only recently identified and discovered. The State, even today, is experiences new losses resulting Defendants' past and present actions. To say that the State is barred from asserting those claims today because it knew of the general practice of Defendants for two decades is a perversion of CERCLA's remedial goals. CERCLA's discovery prong in Section 113 relates to the discovery of the release and its connection with the loss, not the discovery of a general pollution-causing practice.

When viewed with these principles in mind, and CERCLA's overall goal to hold those liable who cause pollution, Defendants' argument is unsupportable. CERCLA should be read broadly to permit trustees to recover damages to natural resources, even if that trustee knew about a general practice or condition that is causing damage to natural resources more than three years before the start of the lawsuit. To forever bar a trustee from recovering past natural resource damages, particularly where the releases and injuries are continuing, would be to preclude one of the important tools Congress provided for in CERCLA -- that is, the recovery of damages for past and future pollution-causing releases.

Even if this Court were to apply Section 113 as a limitation on the State's claim, the plain language of that section does not support Defendants' motion to have the State's entire claim dismissed. The section talks in terms of a single release and a single loss. Under no circumstances could the State have discovered a loss in connection with a release occurring after June 13, 2002 (three years before the date of filing) until the releases or losses themselves actually occurred. Again, every land application event is a new release; every runoff event is a new release; every instance of a hazardous substance leaching into the groundwater is a new release. These releases result in new injuries that could not be discovered until they actually happened. Because releases have continued from June 13, 2002 until the present, at a minimum the State should be able to recover damages for injuries caused by releases and resulting losses after that date. Additionally, the State can recover damages caused by earlier releases to the extent those damages were discovered during the three-year limitation period. Defendants

simply cannot deprive the State of the right to recover under CERCLA when Congress has created this three-year limitation period.[5]

B. Federal Common Law Nuisance

Defendants claim that a two-year statute of limitations applies to a federal common law claim of nuisance, thereby barring the State's claim. Defendants "borrow" a two-year statute of limitations from state law. While Defendants are correct that state law should be borrowed to analyze federal common law, they are wrong to limit their discussion simply to a hand-picked part of a statute of limitations. In short, the state law doctrine that the statute of limitations does not run against the state applies to the State's federal common law claim.

According to the United States Supreme Court, "when Congress has failed to provide a statute of limitations for a federal cause of action, a court 'borrows' or 'absorbs' the local time limitation most analogous to the case at hand." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991). "This borrowing principle applies equally to federal

[5] This interpretation of CERCLA is in line with the common law doctrine of a continuing wrong. Some courts have looked to the common law to guide their interpretation of CERCLA. *See, e.g., United States v. Aceto Agric. Chems. Corp*., 872 F.2d 1373, 1382 (8th Cir. 1989). Under the common law, the time for seeking redress of pollution-causing activities is when the injury is complete. *See Burlington Northern and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1028 (10th Cir. 2007) (citing *Haenchen v. Sand Products Co*., 626 P.2d 332, 334 (Okla. App. 1981); *Elk City v. Rice*, 286 P.2d 275, 278-79 (Okla.1955)). Moreover, under the continuing wrong doctrine, "where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury." *Tiberi v. Cigna Corp*., 89 F.3d 1423, 1430 (10th Cir. 1996) (citing 54 C.J.S. Limitation of Actions § 177 (1987)). In other words, "the statute of limitations does not begin to run until the wrong is over and done with." *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983); *see Burlington Northern & Santa Fe Ry. Co.*, 505 F.3d at 1028 ("the injury is complete upon each alleged invasion, which gives rise over and over to [new] causes of action for damages sustained within the limitations period immediately prior to suit"). Even if the Court were to apply these principles – which the State believes is unnecessary because of the broad remedial goals of CERCLA – the State's entire claim would not be dismissed, but the State would only be limited to damages three-years prior to the filing of this lawsuit in 2005 and into the future. Importantly, earlier damages could still be recovered under state law as explained in *Quapaw Tribe of Oklahoma v. Blue Tee Corp*., 2009 WL 455260, at *6-7 (N.D. Okla. Feb. 23, 2009).

common law actions." *In re Mushroom Transportation Co., Inc.*, 382 F.3d 325, 335 (3rd Cir. 2004).

As explained by the Tenth Circuit, "[o]rdinarily when federal law borrows a state statute of limitations, it also borrows state law governing when the statute begins to run and when it is tolled." *Lujan v. Regents of the University of California*, 69 F.3d 1511, 1516 fn. 5 (10th Cir. 1995); *see also Wilson v. Garcia*, 471 U.S. 261, 269 (1985) ("the length of the limitations period, and closely related questions of tolling and *application*, are to be governed by state law") (emphasis added). "In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and ***questions of application***." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975) (emphasis added). The Supreme Court has cautioned that courts "should not unravel state limitations rules unless their full application would defeat the goals of the federal statute at issue." *See Hardin v. Straub*, 490 U.S. 536, 539 (1989); *see also Johnson*, 421 U.S. at 464 ("In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, *and exceptions thereto*, on the prosecution of a closely analogous claim") (emphasis added).

Defendants agree that the doctrine of *nullum tempus occurrit regi* -- that is, the principle that the statute of limitations does not run against the State -- applies to the State under state law causes of action. (Def. Br., p. 11.) Defendants proceed, however, to take the wholly unsupportable position that this Court should not borrow the doctrine of *nullum tempus occurrit regi* when determining the applicable statute of limitation for the State's federal common law of nuisance claim. Defendants are simply wrong. It cannot be disputed that the doctrine of *nullum tempus occurrit regi* is an integral part of the State of Oklahoma's law governing statutes of

limitations. *See, e.g., Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131, 133 (Okla. 1988). Likewise, it cannot be disputed that the doctrine of *nullum tempus occurrit regi* goes to the *application* of the statute of limitations to the State. *See id.* ("Since 1913, this court has followed the general rule that statutes of limitation ***do not apply*** to a government entity seeking in its sovereign capacity to vindicate public rights . . .") (emphasis added). As such, when borrowing the applicable statute of limitation from state law for the State's federal common law of nuisance claim, this Court must also borrow those principles governing its application, including the doctrine of *nullum tempus occurrit regi*. *See, e.g., Lujan*, 69 F.3d at 1516 fn. 5; *Wilson*, 471 U.S. at 269; *Johnson*, 421 U.S. at 464.

The three cases Defendants cite in support of their assertion that this Court should not borrow the doctrine of *nullum tempus occurrit regi* are readily distinguishable or otherwise unavailing. *First*, Defendants rely upon *West v. Conrail*, 481 U.S. 35 (1987). That case, however, did not deal with a question of application of the statute of limitations. Rather, it held that when a federal court borrows a statute of limitations to apply to a federal cause of action, the court need not also borrow the statute's provisions for service inasmuch as the Federal Rules already provided that governing law.

Second, Defendants rely upon *Moore v. Liberty National Life Insurance Co.*, 267 F.3d 1209 (11th Cir. 2001). Like *West*, that case did not deal with a question of application of the statute of limitations. Rather, it held that the court, when borrowing a state's statute of limitation, would not also borrow the state's rule of repose inasmuch as the rule of repose is distinct and independent from the statute of limitations. *Moore*, in fact, supports the State's position that this Court should borrow the principle of *nullum tempus occurrit regi*. In *Moore* the court stated that it "borrow[s] nothing from state law other than the terms of the statute itself

and closely related state law principles intrinsic to its appropriate application . . .") (emphasis added). As noted above, the principle of *nullum tempus occurrit regi* plainly goes to the appropriate application of the statute of limitation.

Third and finally, Defendants rely upon *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938). That case held that the doctrine of *nullum tempus occurrit regi* does not apply to a foreign sovereign (there, the Soviet Union) suing in state or federal court.[6] Needless to say, the State is not a foreign sovereign. In fact, the Supreme Court expressly affirmed the vitality of the doctrine of *nullum tempus occurrit regi* as to the federal and state governments. It stated:

> So complete has been [the acceptance of the doctrine of *nullum tempus occurrit regi*] that the implied immunity of the domestic "sovereign," state or national, has been universally deemed to be *an exception* to local statutes of limitations where the government, state or national, is not expressly included[.]

Id. at 133 (emphasis added).

In sum, federal law clearly and unequivocally supports the proposition that when it looks to Oklahoma state law to determine the statute of limitation applicable to the State's federal common law of nuisance claim, this Court should borrow those principles addressing its application -- including the doctrine of *nullum tempus occurrit regi*. As such, the State's federal common law of nuisance claim is not time-barred.[7]

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[6] The excerpt that Defendants quote from *Guaranty Trust* deal with waivers of sovereign immunity. In fact, the footnote accompanying the paragraph from which Defendants quote states that "[t]he presumption of a grant by lapse of time will be indulged against the domestic sovereign." *Id.* at 135 fn. 3.

[7] Defendants have argued that the State has not made showings of certain damages or injuries during certain time periods that Defendants believe are relevant. These arguments are irrelevant in light of *nullum tempus occurrit regi*, and Defendants' allegations regarding the State's damages and injuries were not even mentioned in the Statement of Undisputed Facts. The State does not agree with Defendants' characterizations of the evidence of its damages and injuries. Even if Defendants' arguments were relevant, however, Defendants acknowledge that even under the inapplicable standard they advocate, "each separate instance would constitute a

C. The State Law Claims Are Not Barred By Any Limitations Periods[8]

Defendants go to great pains to urge the Court to dismiss "all claims raised on behalf of private individuals." (Def. Br. at 18.) But the State is not seeking to assert the rights of private parties, and has never asserted that it is making claims on their behalf. The State seeks to vindicate public rights, therefore, as Defendants concede "statutes of limitations do not run against the State." (*Id.*)

1. The State Does Not Assert Private Rights Under Its Nuisance Claim

The Second Amended Complaint seeks to vindicate public rights, not private rights, in Count 4: "State Law Nuisance." The Complaint repeatedly makes this point:

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separate nuisance carrying its own two-year limitations period." (Def. Br. at 16.); *see also BNSF*, 505 F.3d at 1028 ("the injury is complete upon each alleged invasion, which gives rise over and over to [new] causes of action for damages sustained within the limitations period immediately prior to suit"). Furthermore, Defendants are well aware that the State has alleged and demonstrated ongoing and continuous nuisance-causing conduct by the Defendants that continues to this day. (SAC, ¶ 113.) The State's expert report on damages related to past aesthetic and ecosystem injuries quantifies the damages created by that ongoing conduct between 1981 and 2008. *See* Def. Br. Ex. 12 (Hanemann, W. Michael, et al.) ("Past Damages Report"). This expert report is not apportioned to the erroneous, limited time frame that Defendants argue is applicable to the State's claims because those time limitations are not applicable in this case. However, the Past Damages Report does clearly identify the amount of damages the State has incurred as a result of Defendants' continuous nuisance-causing conduct from 1981 to 2008. Thus, the Past Damages Report presents evidence of damages during the relevant time frame for the State's federal common law public nuisance claim. Defendants misrepresent a quote from the State's Past Damages Report on p. 17 of their Motion in order to argue that the State's damages cannot be apportioned for a particular year. (Def. Br. p. 17.) This sentence in the report was referencing a calculation from another report in order to explain the methodology used for calculating damages for previous years; it was not limiting the authors' ability to calculate past damages for particular time periods. *See* Def. Br. Ex. 12, p. 2. Finally, the State has made showings of past response costs – including response costs during the last two years – in three affidavits attached to its response to Defendants' motion for summary judgment on the CERCLA claims. *See* Docket #1913, Attachments 6 & 7 (Smithee & Duncan Declarations).

[8] Defendants are not seeking dismissal of all the State's state law claims, only claims asserted on behalf of private parties. (Def. Br. at 18.)

- Paragraph 98: "As a result of their poultry waste disposal practices, the Poultry Integrator Defendants have intentionally caused an unreasonable invasion of, interference with and impairment of the State of Oklahoma's **and the public's beneficial use and enjoyment of the IRW…** (emphasis added).
- Paragraph 99: "Additionally, as a result of their poultry waste disposal practices, the Poultry Integrator Defendants' wrongful conduct has caused an unreasonable and substantial danger to the **public's health and safety** in the IRW…" (emphasis added).

As indicated by Count 4, the State is seeking damages and other relief for Defendants' injury to public rights, not private rights, as Defendants contend. Consequently, their arguments are beside the point.

Significantly, the Defendants do not challenge the State's common law or statutory public nuisance claims. Because of water's widespread public importance, it is the statutory public policy of the State that waters of the State shall not be polluted:

> Whereas the pollution of the waters of this state constitutes a *menace to public health and welfare*, creates *public nuisances*, is harmful to wildlife, fish and aquatic life, and *impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water*, it is hereby declared to be the *public policy of this state* to conserve and utilize the waters of the state and to protect, maintain and improve the quality thereof *for public water supplies*, for the *propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses*; and to cooperate with other agencies of this state, agencies of other states and the federal government in carrying out these objectives.

82 Okla. Stat. § 1084.1 (emphasis added). Moreover, polluting the state's waters, or placing wastes where they are likely to pollute the land or waters of the state, is also declared by statute to be a public nuisance:

> It shall be unlawful for any person to *cause pollution of any waters of the state* or to place or *cause to be placed any wastes* in a location where they are *likely to cause pollution* of any air, *land or waters* of the state. Any such action is hereby declared to be a *public nuisance*.

27A Okla. Stat. § 2-6-105**.** An action by the State itself to recover for injury to the public water and to protect the public health and welfare is manifestly a public action, and is not subject to any statute of limitations.

The very cases relied upon by Defendants make this proposition certain. (Def. Br. at 18.) The general rule is that statutes of limitation do not bar suit by any government entity acting in its sovereign capacity to vindicate public rights, and that public policy requires that every reasonable presumption favor government immunity from such limitation. *Oklahoma City Mun. Imp. Authority v. HTB, Inc.*, 769 P.2d 131, 134 (Okla. 1988) (suit alleging negligent construction of water system for Oklahoma City and its area). In this context, "public" is pertaining to the people, or affecting the community at large. *Id.* at 135-36. In *HTB* the court found it inconceivable that of the claim arising from a defectively constructed water system was anything but "public," because the flow of water in Oklahoma City affects the rights not only of the citizens whose water travels through the 8 ½ miles of pipe at issue, but also the rights of travelers, fairgoers, horserace fans, and businesses contemplating expansion or relocation there. *Id.* at 136. The court recognized, as should this Court, that "[w]ater is fundamental to existence." *Id.* Similarly, but in another context, the court recognized that an action to compel performance of a contract to convey title to land for a county courthouse and adjoining street was one to enforce public rights because the public at large used both the courthouse and the street. *Herndon v. Board of Com'rs In & For Pontotoc County*, 11 P.2d 939, 941 (Okla. 1932). In contrast, an action to recover an alleged overpayment of salary to a public official was merely a private action of a county, and subject to the statute of limitations. *Board of Com'rs of*

Woodward County v. Willett, 152 P. 365, 366 (Okla. 1915).

It is not disputed that the public waters of the IRW are used not only by riparian owners but by many municipalities and by the public at large. The public at large, and specifically those using the public waters of the IRW for drinking water or recreation, have a legitimate interest and a well founded claim to clean, safe water under the common law and statutory public policy prohibiting pollution of water. Thus, this case seeking redress for pollution of the state's waters can only be considered an action to enforce public rights. Consequently, no statute of limitations bars the State's public nuisance claims, and no distinction need be made between "permanent" or "temporary" nuisances or trespasses.

While the State believes that, under the circumstances of this case, CERCLA does not preempt its state law claims, it is clear that if the Court applies any temporal limitations to the State's CERCLA natural resource damage case, then the State may recover damages under its state law claims for natural resource damages suffered before any applicable time period because (1) no statute of limitations bars that recovery under state law, and (2) such a recovery under state law in no way conflicts with CERCLA's remedial scheme. *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 2009 WL 455260, *6-*7 (N.D. Okla. Feb. 23, 2009).

2. The State's Trespass Claim Does Not Arise From Private Rights.

Defendants erroneously argue that the State's trespass claim is barred by the two-year statute of limitations because the State's action allegedly arises from private and not public rights. Defendants assert that the State's action is merely one based on its possessory interest in "government property"-- public water-- in a manner identical to a private litigant. (Def. Br. at 19.)

Water running in a definite stream, formed by nature over or under the surface not used by riparian owners is public water and subject to appropriation *for the benefit and welfare of the people of the state*. 60 Okla. Stat. § 60. Public water is a matter of public interest and not merely "government property" under the control of the State, as evidenced by 82 Okla. Stat. § 1084.1 and 27A O.S. § 2-6-105, cited above.[9] An action to recover for its trespass is every bit as much a public-interest action as suing over title to a courthouse and a public street. *Herndon*, 11 P.2d at 941. The legal principles that deterred the Defendants from challenging the State's public nuisance claims under state law, cited above, apply equally to the State's trespass claim. This issue is not the ownership of the property, but the character of the right at issue, whether public or private. This case is indisputably a public right and public interest case filed by the State. Consequently, no statute of limitations bars the State's common law trespass action.

D. Enactment Dates

The State agrees that there is no retroactive application of the statutes at issue in this litigation. The State agrees that with regard to its claims under Section 2-18.1 of the Oklahoma Agriculture Code (a portion of Count 7), Oklahoma Registered Poultry Feeding Operations Act and its regulations (Count 8), and Oklahoma Concentrated Animal Feeding Operations Act and its regulations (Count 9), Defendants have correctly identified the applicable effective dates.

Defendants have not, however, correctly identified the effective date of Oklahoma's general pollution statute, 27A O.S. § 2-6-105 (Counts 4 & 7). In 1993, the legislature re-numbered the statute as 27A O.S. § 2-6-105. The statute was originally passed in 1955. See

[9] Defendants attempt to muddy the water by claiming that, in the trespass claim, the State is only seeking to assert its claim with respect to "government property." As Docket #1111 at Page 17 clearly shows, the State is seeking to assert its claim with respect to waters of the State, including groundwater and surface water.

Session Laws of Oklahoma, 1955, page. 478 (House Bill No. 986, Chapter 9, "Pollution of Waters", Section 5.) (Attached as **Exhibit A**).[10] The State concedes that it cannot seek damages for conduct that occurred solely before 1955 under this statute.

V. Conclusion

The State agrees that Defendants have been polluting Oklahoma's waters for many years. The State agrees that Defendants' conduct has caused damage -- both damage in the past and damage that will continue into the future. But the simple fact that Defendants have continued this illegal conduct for decades – or that the State has been aware of Defendants' pollution causing activities for many years – does not allow them to escape liability. As explained above, such an interpretation of CERCLA would conflict with CERCLA's broad goals. And what's more, the State is protected from Defendants' remaining arguments under the doctrine that statutes of limitations do not run against the State.

Therefore, for these reasons, the State respectfully requests that Defendants' motion be denied in its entirety.

Respectfully Submitted,

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[10] That 1955 law provided: "It shall be unlawful for any person to cause pollution as defined in Section 2(a) of this Act of any water of the State or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the State. Any such action is hereby declared to be a public nuisance."

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